



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 29, 1998

Ms. Jennifer D. Soldano
Associate General Counsel
Texas Department of Transportation
125 E. 11th Street
Austin, Texas 78701-2483

OR98-1074

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 114710.

The Texas Department of Transportation (the "department") received a request for "complete and currently updated specifications" of the department's herbicide spray equipment system. You explain that the requestor is referring to a software system developed by the department. You state that the department has a common-law copyright to the software pursuant to Transportation Code, Section 201.205. You also assert that the requested information is excepted from required public disclosure based on section 552.110 of the Government Code.

Section 201.205 of the Transportation Code provides in pertinent part as follows:

(a) The department may

(1) apply for, register, secure, hold and protect under the law of the United States, any state, or any nation a patent, copyright, trademark, or other evidence of protection or exclusivity issued in or for an idea, publication, or other original innovation fixed in a tangible medium, including:

...

(E) a map or planning document;

(F) an engineering, architectural, or graphic design.

If requested records are copyrighted, a governmental body is not required to furnish the requestor with copies of such records.¹ Members of the public may inspect copyrighted materials, unless such materials are excepted from public disclosure or otherwise protected by law. *See* 17 U.S.C. §§ 106, 107; *see* Attorney General Opinion JM-672 (1987), Open Records Decision No. 550 (1990) at 8-9.

You raise section 552.110 of the Government Code. Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." In applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). *See* Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2.²

You have provided no information to support your claim that the requested information is excepted from disclosure based on section 552.110. Furthermore, we do not believe that the information submitted is protected as commercial or financial information. The requestor here does not seek commercial or financial information that the governmental body has obtained from a person. Open Records Decision Nos. 590 (1991) at 4 (list of donors and donation amounts to public university not protected by section 552.110), 568 (1990) at 3 (names and percentages of each member of the Cigarette Tax Recovery Trust Fund not "obtained" from distributors, but generated by distributor's participation in Trust Fund). The information here is generated and maintained by the department. Consequently, although the department need not release copies of the requested information, the department cannot deny the requestor the right to inspect such information based on section 552.110.

¹Members of the public may inspect copyrighted materials held as public records, and make copies of such records unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. Attorney General Opinion MW-307 (1981).

²This office also considers the following six factors in making trade secret determinations: 1) the extent to which the information is known outside of [the company's] business; 2) the extent to which it is known by employees and others involved in [the company's] business; 3) the extent of measures taken by [the company] to guard the secrecy of the information; 4) the value of the information to [the company] and to [its] competitors; 5) the amount of effort or money expended by [the company] in developing this information; 6) the ease or difficulty with which the information could be properly acquired or duplicated by others. RESTATEMENT OF TORTS, § 757 (1939)

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/gle

Ref.: ID# 114710

Enclosures: Submitted documents

cc: Mr. Gene Vincent
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(w/o enclosures)